IN THE SUPREME COURT OF FLORIDA

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DAVID ROSS DELAP,	)	
Appellant,	)	
v.	)	CASE NO. 68,266
STATE OF FLORIDA,	)	
Appellee.	)	

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Nineth Judicial Circuit, in and for Orange County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal.

The following symbols will be used:

R	Record on Appeal (includes first and second trials)
AB	Appellant's Brief

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and his Statement of the Facts to the extent that they present an accurate, non-argumentative recitation of all prior proceedings, subject to the following additions and clarifications:

In the opening trial statements, both defense counsel and the prosecutor stated that Appellant falsely imprisoned Paula Etheridge and forceably kept her in his car (R. 328, 331-332). Defense counsel asserted that the victim's death could have occurred in many ways (R. 332). Dr. Schofield testified, not that he could testify as to the cause of death within a reasonable medical certainty, but merely that he though he could present a logical cause of death (R. 341-342, 349). Dr. Schofield's theory was that a combination of causes were present (R. 349), i.e., a skull fracture and strangulation (R. 350, 351). Dr. Schofield did not know the cause of the skull fracture or when it occurred (R. 383) and merely postulated that the most prominent theory as to the cause of death was strangulation (R. 384).

The main difference between the above testimony and Dr. Schofield's first trial testimony was that, at the first trial, the doctor said he would rather not suggest that either cause (the skull fracture or strangulation) was more prominent (R. 2965). Dr. Schofield's first trial testimony was consistent with

his second trial testimony in mentioning the markings found on the victim's neck indicated strangulation (R. 350-351, 2958). Dr. Schofield, on cross-examination, admitted at trial number two, that could not be certain that death was caused by strangulation (R. 372-374), and, consistent with his first trial testimony, he still believed there were two possible causes of death (R. 355, 2960).

On cross-examination, Dr. Schofield was forced to admit that he could not prove that the victim was manually strangled (R. 356). He further admitted that breakage of the hyoid bone would be consistent with manual, premeditated strangulation (R. 359-360), and Dr. Schofield also stated that he found the victim's hyoid bone was normal (R. 361). Dr. Schofield further admitted the possiblity existed, that death could have been caused by a blow to the neck, cutting off air to the lungs (R. 384-385). At the first trial, Lem Brumley testified that Appellant confessed that the victim struggled considerably while in Appellant's car, and to subdue her Appellant held onto her with his right hand around her neck (R. 2988). Brumley also stated how Appellant related that he beat Paula Etheridge, until he observed she was no longer breathing (R. 2990). At the second trial, Brumley related a similar version of the facts regarding Appellant's beating the victim, except that he did state that Appellant told him he beat and choked the victim until she was no longer breathing (R. 745).

Defense counsel, impeached Mr. Brumley's recollection as to a statement made to him by Appellant (R. 839) and Brumley was further forced to admit that the notes that he had taken of Appellant's confession were sketchy (R. 866).

During the second trial closing defense argument, counsel argued for a conviction on second degree murder (R. 946-947), admitting the evidence showed Appellant's criminal responsibilty (R. 932), but contending that Mr. Brumley's recollection was suspect (R. 947). The prosecution argued that Mr. Brumley's testimony indicated that Appellant struck the victim on the head, and then she was silent (R. 963). This argument was made to support the proposition that the element of premeditation existed (R. 962). Support for the proposition that cruel, heinous and atrocious circumstances surrounded the murder of Paula Etheridge came from the testimony of Brumley and other witnesses who observed Paula Etheridge in mortal fear, screaming and hollering and trying to exit the car (R. 966).

For example, witness Ava Leonard saw a car swerve into her yard (R. 470), with a girl hanging out of the door of the car screaming "help me, God somebody help me" (R. 470). The car was swerving all over the road (R. 470-471). The girl was wearing a red blouse and tan or brown shorts (R. 471). Ms. Leonard's daughter, Becky McCoin, also witnessed the same incident (R. 475-477).

Lois Huff testified that on June 30, 1975, between 5:15 and 6:30 p.m., while driving east on Highway 70 with her daughters she saw something unusual in her rearview mirror (R. 479-480). Namely a woman struggling with a man in a car, trying to get out of the car (R. 480). The right-hand door of the car was open.

Walpole truck driver, Willie Kelly, saw a '75 Plymouth or Dodge with faded color proceeding at approximately 40 to 50 miles per hour, with a door open and a hand hanging out of the door (R. 507-509). The door was closed all the way back against the hand (R. 517).

St. Lucie Deputy Miller, testified the body was found clothed in red tennis sneakers and light colored shorts, but with no bra or blouse (R. 539).

The trial court found the following aggravating and mitigating circumstances existed in this case:

AGGRAVATING CIRCUMSTANCES

(a) The capital felony was commited by a person under sentence of imprisonment in that the defendant was convicted of the felony of "unarmed robbery and an assault with intent to commit rape", and under sentence and parole therein. For details see State's Exhibits in evidence # 25 and # 26.

(b) The defendant was previously convicted of another felony involving the use or threat of violence to the person, said felony being the same felony referred to in paragraph (a) above.

(c) The defendant knowingly created a great risk to many persons when he drove down Highway # 70 with one arm on the wheel of the automobile in question and the other arm holding the victim in such a manner as to allow her to hang out the banging open door of the vehicle. This reckless driving could easily have resulted in a collision with either another vehicle or a school bus resulting in death to many persons.

(d) The capital felony was committed while the defendant was engaged in commission of a kidnapping, robbery, and rape.

(e) The capital felony was committed for pecuniary gain.

(f) The capital felony was especially cruel.

MITIGATING CIRCUMSTANCES

(a) None.

(b) None.

(c) None.

(d) None.

(e) None.

(f) None.

(g) None.

(h) The defendant's behavior at his second trial and during his stay on death row (as determined by the court's own personal investigation) was acceptable. Perhaps there was some remorse. It is unfortunate that the law upon the conviction of the first offense does not allow for castration in cases of this nature for then neither school teacher nor the defendant would be in their current predicament.

> This court finds from the evidence, the aggravating circumstances exceed the mitigating circumstances in this case, thus warranting both the jury and the court's death sentence.
> (R. 2460-2461)

In Delap v. State, 440 So.2d 1242 (Fla. 1983), this Court approved all of the above aggravating circumstances except this Court did find that the evidence was insufficient to support the finding that the felony was commited for pecuniary gain. Supra at 1257.

This Court did not conclude the finding that the murder was cruel, heinous, and atrocious was based upon a strangulation theory, instead this Court concluded that:

> Evidence of the victim's kidnapping, her struggle, her pleas for help, and the extremely cruel beating and strangulation death supports the finding that the murder was extremely cruel, heinous, and atrocious.

440 So.2d at 1257. The record indicates that Mr. Brumley was not, in fact, allowed to remain at counsel's table throughout trial. Some ambiguity as to this point exists in the instant record, but a careful perusal of the record indicates that after defense counsel objected to Mr. Brumley's presence and the prosecution argued the decision was discretionary, the trial court said:

> THE COURT: Well, each of you have an investigator at the counsel table at the present time. I think that is only fair that each of you be allowed one. I will overrule your objection. I feel it is a matter of the court's discretion. The

> court is acquainted with Mr. Brumley and has been down through the years. I assume he was at the counsel table at the first trial.
> (R. 324-325)

So it temporarily appeared that Mr. Brumley was going to be allowed to remain. However, subsequent to further discussion, the trial judge finally did rule:

> THE COURT: I am going to deny your request to allow him to stay at counsel table. By the same token, you have an investigator at your counsel table.
> (R. 325)

Lem Brumley's first trial testimony was substantially similar to his testimony at the second trial, and Brumley's first trial testimony was corroborated by Detective Bill Arnold (R. 3061-3062), supported in part, by Appellant himself (R. 3187-3188, 3232 , and by Dr. Gilbert's testimony (R. 3121).

At the first trial, Appellant admitted grabbing the victim by the neck (R. 3187-3188), tying her hands up with her blouse (R. 3189), killing Paula Etheridge and transporting her body to a location with a cabbage hammock (R. 3211). Dr. Gilbert testified that Appellant told him he hit the victim, and held her by the neck while she was in his car (R. 3121). Appellant testified he didn't remember confessing to police, but did remember telling them where the body was (R. 3223).

POINTS ON APPEAL

POINT I

WHETHER APPELLANT'S MOTION FOR POST-CONVICTION RELIEF WAS LEGALLY INSUFFICIENT ON ITS FACE?

A. WHETHER APPELLANT'S MOTION FOR POST-CONVICTION RELIEF STATED ANY LEGALLY SUFFICIENT GROUNDS TO BASE AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON?

B. WHETHER APPELLANT'S MOTION FOR POST-CONVICTION RELIEF WAS LEGALLY INSUFFICIENT TO STATE GROUNDS FOR RELIEF BASED UPON THE ALLEGED WITHHOLDING OF IMPEACHMENT EVIDENCE?

SUMMARY OF THE ARGUMENT

Appellant's Motion for Post-Conviction Relief did not state any legally sufficient claim. The instant record, as a whole, refutes Appellant's allegations as to ineffective assistance of trial counsel. An evidentiary hearing on either of Appellant's claims would be an exercise in futility because, even if taken at face value, Appellant's allegations of changed testimony would not have affected the outcome of his trial.

ARGUMENT

POINT I

APPELLANT'S MOTION FOR POST-CONVICTION RELIEF WAS LEGALLY INSUFFICIENT ON ITS FACE.

Appellant argues that the trial court erred by failing to hold an evidentiary hearing and by failing to attach portions of the record to show that Appellant is not entitled to post-conviction relief. However, Fla.R.Crim.P., Rule 3.850 reads in part:

> If the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when such denial is not predicated upon the legal insufficiency of the motion on its face, a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief shall be attached to the order.
>
> (emphasis added)

Appellee submits that, in the case at bar, Appellant's motion was insufficient on its face and thus there was no need to attach portions of the record to show why he was not entitled to relief. Gulley v. State, 436 So.2d 1042 (Fla. 1st DCA 1983); Watkins v. State, 413 So.2d 1275 (Fla. 1st DCA 1982).

The law is also clear that under 3.850 procedure, a movant is entitled to an evidentiary hearing unless the records conclusively show that the movant is entitled to no relief. O'Callahan v. State, 461 So.2d 1354, 1355 (Fla. 1985); Meeks v.

State, 382 So.2d 673, 676 (Fla. 1980). Since, sub judice, no portions of the record were attached to the trial court's order, the presumption must be that the lower court's ruling was based on the face of the pleading. Thames v. State, 454 So.2d 1061, 1066 (Fla. 1st DCA 1984). Because Appellant's motion, when viewed in the light of the entire record at bar, clearly shows that the movant is entitled to no relief, the trial court correctly denied relief without an evidentiary hearing. Middleton v. State, 465 So.2d 1218, 1221 (Fla. 1985); Mann v. State, 482 So.2d 1360, 1361 (Fla. 1986); Porter v. State, 478 So.2d 33 (Fla. 1985); Harich v. State, 11 F.L.W. 119 (Fla. March 18, 1986). Appellee will proceed to illustrate how the instant record conclusively shows that no legally sufficient point has been raised by Appellant.

A. APPELLANT'S MOTION FOR POST-CONVICTION RELIEF DID NOT STATE ANY LEGALLY SUFFICIENT GROUNDS TO BASE AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON.

Appellant first contends that impeachment testimony was not adduced that would have affected the jury's determination of premeditation (AB 25, 26). Specifically, Appellant claims that testimony of Dr. Schofield and Lem Brumley changed significantly from the first trial to the second trial in regard to the specific act causing Paula Etheridge's death (AB 30).

Appellant argues that if the jury had considered earlier testimony indicating that Paula Etheridge was beaten to death, rather than strangled, they would have concluded that a lack of evidence existed to find premeditation. Appellant also contends that the evidence of strangulation supported the finding of the aggravating factor that the murder was extremely cruel, heinous and atrocious (AB 33, 34). This latter contention is at odds with the record at bar (R. 2460-2461), and with this Court's prior recitation of the facts, which was:

> AGGRAVATING CIRCUMSTANCES
>
> (a) The capital felony was committed by a person under sentence of imprisonment in that the Defendant was convicted of the felony of "unarmed robbery and an assault with intent to commit rape", and under sentence and parole therein. For details see State's exhibits in evidence # 25 and # 26.
>
> (b) The Defendant was previously convicted of another felony involving the use or threat of violence to the person, said felony being the same felony

referred to in paragraph (a) above.

(c) The Defendant knowingly created a great risk to many persons when he drove down Highway # 70 with one arm on the wheel of the automobile in question and the other arm holding the victim in such a manner as to allow her to hang out the banging open door of the vehicle. This reckless driving could easily have resulted in a collision with either another vehicle or a school bus resulting in death to many persons.

(d) The capital felony was committed while the Defendant was engaged in the commission of a kidnapping, robbery, and rape.

(e) The capital felony was committed for pecuniary gain.

(f) The capital felony was especially cruel.

MITIGATING CIRCUMSTANCES

(a)--(g) none

(h) The Defendant's behavior at his second trial and during his stay on death row (as determined by the court's own personal investigation) was acceptable. Perhaps there was some remorse. It is unfortunate that the law upon the conviction of the first offense does not allow for castration in cases of this nature for then neither the school teacher nor the defendant would be in their current predicament.

<u>This Court finds from the evidence the aggravating circumstances exceed the mitigating circumstances in this case, thus warranting both the jury and the Court's death sentence.</u>

(emphasis added)

<u>Delap v. State</u>, 440 So.2d 1242, 1254-1255 (Fla. 1983).

This Court did not conclude the finding that the murder was cruel, heinous, and atrocious was based upon a strangulation theory (<u>see</u>, AB 33-34). Instead this Court concluded that:

> Evidence of the victim's kidnapping, her struggle, her pleas for help, and the extremely cruel beating and strangulation death supports the finding that the murder was extremely cruel, heinous, and atrocious.

440 So.2d at 1257. Appellee therefore submits that the prejudice prong of Strickland v. Washington, infra, has not been met by Appellant's pleadings.

In Strickland v. Washington, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court held that there are two parts in determining a defendant's claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

80 L.Ed.2d at 693; see also, Quince v. State, 10 F.L.W. 493, 494 (Fla. September, 1985). In explaining the appropriate test for proving prejudice the Court held that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 80 L.Ed.2d at 698. As the Court explained in United States v. Cronic, 466

U.S. 668 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the basis for the Sixth Amendment guarantee of the right to counsel is to ensure the adversarial system functions. When trial counsels' representation is reviewed in light of these standards, it is evident that Appellant received effective assistance and it is apparent that even if the cause of death was found to be from a beating, cruel and atrocious circumstances would still exist. Appellee does not at all concede that alleged inconsistencies in testimony would merit a change in concluding what the specific cause of death was. Appellee merely challenges the significance this hypothetical situation would have.

The fact is, in the opening statements, both defense counsel and prosecution stated that Appellant falsely imprisoned Paula Etheridge and forceably kept her in his car (R. 328, 331, 332). Defense counsel asserted that the victim's death could have occurred in many ways (R. 332). Dr. Schofield testified, not that he could testify as to the cause of death within a reasonable medical certainty, but merely that he thought he could present a logical cause of death (R. 341-342, 349). The Doctor's theory was that a combination of causes were present (R. 349), i.e., a skull fracture <u>and</u> strangulation (R. 350, 351). Dr. Schofield didn't know the cause of the skull fracture or when it occurred (R. 383) and he merely postulated that the most prominent theory as to the cause of death was strangulation (R. 384).

The only difference between the above testimony and Dr. Schofield's first trial testimony was that, at the first trial, the Doctor said he would rather not suggest that either cause (the skull fracture or strangulation) was more prominent (R. 2965). Dr. Schofield's first trial testimony was consistent in mentioning the markings found on the victim's neck indicated strangulation (R. 350, 351, 2958). Dr. Schofield, on cross-examination, admitted at trial No. 2, that he could not be certain that death was caused by strangulation (R. 372-374), and, consistent with his first trial testimony, he still believed there were two possible causes of death (R. 355, 2960). Appellee submits the record clearly reveals that trial counsel functioned effectively; moreover Appellant has not made a showing to this Court that _but for_ counsel's unprofessional errors, the result of the proceeding would have been different. _State v. Bucherie_, 468 So.2d 229 (Fla. 1985).

As to Lem Brumley's testimony, Appellee submits its chief significance was in establishing the element of premeditation during the guilt phase of the trial. The record support for this assertion is overwhelming and defense counsel's closing argument is illustrative as counsel argued for a conviction on _second degree_ murder (R. 946-947), admitting the evidence showed Appellant's criminal responsibility (R. 932), but contending that Mr. Brumley's recollection was suspect (R. 947). The prosecution argued that Mr. Brumley's testimony

indicated that Appellant struck the victim on the head, and then she was silent (R. 963). This argument was made to support the proposition that the element of premeditation existed (R. 962). Support for the cruel and atrocious circumstances came from the testimony of Brumley <u>and other</u> witnesses who observed Paula Etheridge in mortal fear, screaming and hollering and trying to exit the car (R. 966).

For example, witness Ava Leonard saw a car swerve into her yard (R. 470), with a girl hanging out of the door of the car screaming, "help me, God somebody help me" (R. 470). The car was swerving all over the road (R. 470-471). The girl was wearing a red blouse and tan or brown shorts (R. 471). Ms. Leonard's daughter, Becky McCoin, also witnessed the same incident (R. 475-477).

Lois Huff testified that on June 30, 1975, between 5:15 and 6:30 p.m., while driving east on Highway 70 with her daughters she saw something unusual in her rear view mirror (R. 479-480). Namely, a woman struggling with a man in a car, trying to get out of the car (R. 480). The right-hand door of the car was open.

Walpole truck driver, Willie Kelly, saw a '75 Plymouth or Dodge with faded color proceeding at approximately 40 to 50 miles per hour, with a door open and a hand hanging out of the door (R. 507-509). The door was closed all the way back against the hand (R. 517).

It is obvious from the instant record that evidence apart from Lem Brumley's testimony existed to support the finding that the murder was cruel, heinous, and atrocious, and that the murder was a premeditated one. Moreover, there is no factual basis existing to conclude that the theory of strangulation, as a cause of death, necessarily forced a determination that the circumstances were cruel and atrocious. Even if strangulation were automatically equated with this "cruel and heinous" factor, that would still leave four other aggravating circumstances previously approved by this Court, Delap, supra at 1254, so the sentence would have remained unchanged, see, Middleton, supra at 1224.

Appellant also argues that defense counsel's cross examination of Dr. Schofield and Lem Brumley deprived him of his "...Fifth (sic) Amendment right to effective cross examination..." (AB 36). Delaware v. Van Arsdale, ___ U.S. ___, 39 Cr.L. 3007 (April 7, 1986), and Davis v. Alaska, 415 U.S. 308 (1974) are cited in support of this claim, but in both cases the trial court prohibited questions that could have brought out possible bias of prosecution witnesses. In the case at bar, there was no trial court ruling inhibiting cross examination of the State witnesses, and cross examination of the two witnesses was vigorous and thorough.

Dr. Schofield was forced to admit that he could not prove that the victim was manually strangled (R. 356). He

further admitted that breakage of the hyoid bone would be consistent with manual, premeditated strangulation (R. 359-360), and Dr. Schofield also stated that he found the victim's hyoid bone was normal (R. 361). Before defense counsel was through with Dr. Schofield, the doctor had to admit the possibility existed that death could have been caused by a blow to the neck, cutting off air to the lungs (R. 384-385). Surely cross examination in this instance was constitutionally effective. Whether or not it would have been more effective to have used minor inconsistencies in Dr. Schofield's prior testimony for impeachment purposes is purely second-guessing, a classic illustration of the use of hindsight to prove an ineffectiveness claim. See, Strickland, 80 L.Ed.2d at 694-695.

As to the failure to impeach Lem Brumley with his prior trial testimony, Appellee asserts that the inconsistency pointed out by Appellant was minor. At the first trial, Brumley testified that Appellant confessed that the victim struggled considerably while in his car, and to subdue her Appellant held onto her with his right hand around her neck (R. 2988). Brumley also stated how Appellant related that he beat Paula Etheridge, until he observed she was no longer breathing (R. 2990). At the second trial Brumley related a similar version of the facts regarding Appellant's beating the victim, except that he did state that Appellant told him he beat and choked the victim until she was no longer breathing (R. 745). Although this particular

inconsistency was not brought out at the second trial, Mr. Brumley's recollection was impeached as to a statement made to him by Appellant (R. 839) and Brumley was forced to admit that the notes he had taken of Appellant's confession were sketchy (R. 866). Altogether Appellant has failed to make any claim that, even if supported by evidence, could establish any substantial and prejudicial deficiency of performance. See generally, Troedel v. State, 479 So.2d 736, 737 (Fla. 1985); Middleton v. State, supra at 1226. Moreover, with regard to each witness, Appellee asserts the method of cross examination was a matter of trial tactics, and Appellant has not shown any possible change in the outcome that would have resulted, had his proposed strategy been followed. Armstrong v. State, 429 So.2d 287, 290 (Fla. 1983).

Appellant's contention regarding the failure to request a Richardson hearing also falls within the realm of trial tactics and there was no factual basis for trial counsel making this request. See, Middleton, supra at 1225.

Likewise the decision not to call Appellant as a witness, was a tactical decision. Based on Appellant's previous trial testimony, it appears this decision was prudent. In the first trial Appellant's testimony was devastating to his case (R. 3187-3190, 3196, 3211, 3219, 3224, 3231-3232). Appellant's convenient lapses in memory were inconsistent with his own testimony and other witnesses' recollections of his statements (R. 3121, 3123, 3219).

As the United States Supreme Court explained in United States v. Cronic, 466 U.S. 668, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the basis for the Sixth Amendment guarantee of the right to counsel is to ensure the adversarial system functions. When trial counsels' representation is reviewed in light of these standards, it is quite evident, that Appellant received effective assistance.

B. APPELLANT'S MOTION FOR POST-CONVICTION RELIEF WAS LEGALLY INSUFFICIENT TO STATE GROUNDS FOR RELIEF BASED UPON THE ALLEGED WITHHOLDING OF IMPEACHMENT EVIDENCE.

Appellant next makes the specious argument that he made a prima facie case in the lower court by contending that the prosecution suppressed evidence that would have impeached Lem Brumley's credibility (AB 38-40). Before addressing the merits of this alleged Brady violation, Appellee must point out that this argument is not cognizable under Rule 3.850, because it could have been presented on direct appeal. McCrae v. State, 437 So.2d 1388 (Fla. 1983). This Court has repeatedly stated that a 3.850 motion cannot be utilized as a second appeal. O'Callahan v. State, supra at 1355; Jones v. State, 446 So.2d 1059 (Fla. 1984); Demps v. State, 416 So.2d 808 (Fla. 1982).

Appellee is aware that, at trial, Appellant was unaware of Mr. Brumley's participation in an illegal drug smuggling conspiracy, however Mr. Brumley had entered into his plea agreement in October, 1981, and had his judgment entered on February 19, 1982 (Appellant's Exhibits). Since Appellant's direct appeal was not decided until September, 1983, there was no good reason why the instant issue could not have been presented at the time of the direct appeal.[1] See Combs v. State, 403 So.2d 418, 422 (Fla. 1981).

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[1]Presumably this Court could have relinquished jurisdiction so that the trial court could rule on this issue. See generally, Stone v. State, 481 So.2d 478 (Fla. 1986).

In any event Appellee submits there is no merit to this second point. As a preliminary matter Appellee asserts the instant record contains no support for the proposition that Mr. Brumley was in fact allowed to remain at counsel's table throughout the trial. After defense counsel objected to Mr. Brumley's presence and the prosecution argued the decision was discretionary, the trial court said:

> THE COURT: Well, each of you have an investigator at the counsel table at the present time. I think that is only fair that each of you be allowed one. I will overrule your objection. I feel it is a matter of the Court's discretion. The Court is acquainted with Mr. Brumley and has been down through the years. I assume he was at the counsel table at the first trial.
> (R. 324-325)

So it temporarily appeared that Mr. Brumley was going to be allowed to remain. However, subsequent to further discussion the trial judge finally did rule:

> THE COURT: I am going to deny your request to allow him to stay at counsel table. By the same token, you have an investigator at your counsel table.
> (R. 325)

Thus the record refutes the allegation that Lem Brumley changed his trial testimony to make it conform with the second trial testimony of Dr. Schofield.

However even if Brumley had been seated the whole time in court, Appellant's argument would still fail for a multitude

of reasons. To begin with, the prosecutor could not be said to have "suppressed" the information. Appellant's exhibits make clear the fact that Lem Brumley was not charged with any crime until some three (3) years subsequent to the trial. While Appellant has alleged that the federal authorities charged Brumley with participation in a conspiracy which occurred prior to October, 1977 (AB 40), Appellant has not contended that the federal authorities knew, at the time of trial, that Lem Brumley was involved in this drug smuggling operation. This Court has held:

> In the absence of actual suppression of evidence favorable to an accused, however, the state does not violate due process in denying discovery. Antone v. State, 410 So.2d 157 (Fla. 1982).

James v. State, 453 So.2d 786, 790 (Fla. 1984).

Appellant's argument regarding constructive knowledge by the State of Brumley's activities is ludicrous, because it presupposes that the State should be aware of all its employees' illegal activities. Calling Brumley a "mole in the law enforcement apparatus for a narcotics smuggling ring" (AB 40) implies that Brumley was actually working for the State at the time. If that were true Lem Brumley would have had an effective defense to the subsequent federal charges. Appellant is actually arguing against himself in this regard.

Appellant cites cases holding that evidence withheld by one State executive branch department is imputed to be within the

knowledge of another State executive branch department. E.g., Antone v. State, 355 So.2d 778 (Fla. 1978). Appellant also cites cases in which one Assistant United States Attorney's knowledge was imputed to the Federal Government as a whole. E.g., Giglio v. United States, 405 U.S. 150, 31 L.Ed.2d 104 (1972). Appellant has even cited a case where knowledge of state officials was imputed to the Federal Government. United States v. Antone, 603 F.2d 566, 570 (5th Cir. 1979). However the fatal flaw in Appellant's constructive knowledge argument is that in each case he has cited, the activites undisclosed to defendants (e.g., fee payments to government witnesses), were activities sanctioned by a branch of government. Thus the officials with actual knowledge of the undisclosed activities were acting within the scope of their employment. Because these officials were acting within the scope of their employment, and were engaged in legitimate law enforcement activities, it was possible to place a duty on the prosecution to communicate with these officials, if these officials could be said to be, in a sense, members of the prosecutorial team. Id.

In the instant case there was no overlaping of State and Federal investigations (compare, United States v. Antone, supra at 570), so even by Antone standards it is not reasonable to conclude that extensive cooperation between investigative agencies existed. Appellant did not allege this in his 3.850 motion. Moreover, in United States v. Walker, 720 F.2d 1527,

1535 (11th Cir. 1983), cert. denied, 104 S.Ct. 1614 (1984), the United States Eleventh Circuit Court held that knowledge of a state statutory contingency fee arrangement could not be imputed to the Federal prosecutor.

There is still more support for the assertion that the government, sub judice, did not "suppress" evidence. The United States Eleventh Circuit Court responded to a contention that the Federal Government "should have known" of a government witness' Florida misdemeanor convictions, stating:

> 'While Brady requires the government to tender to the defense all exculpatory evidence in its possession, it establishes no obligation on the government to seek out such evidence.' United States v. Walker, 559 F.2d 365, 373 (5th Cir. 1977); see also United States v. Beaver, 524 F.2d 963, 966 (5th Cir. 1975) 'But Brady clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess.' cert. denied, 425 U.S. 905, 96 S.Ct. 1498, 47 L.Ed.2d 756 (1976); accord United States v. Atkinson, 512 F.2d 1235, 1239 (4th Cir. 1975) (government prosecutor has no duty to disclose information to the defense as to the criminal background of a prosecution witness where it is not even charged that government attorneys were in possession of the information).

United States v. Luis-Gonzalez, 719 F.2d 1539, 1548 (11th Cir. 1983).

Again, Appellant has not even alleged facts which support his claim of suppression of favorable evidence, because no deal between prosecutors, federal or state, was alleged to be

made in return for Brumley's testimony. In Herman v. State, 396 So.2d 222, 226 (Fla. 4th DCA 1981), the Fourth District Court characterized this speculative type of argument as "frivolous." The district court reasoned that since no deal was made, no disclosure was required. Id.

Finally we come to the issue of the materality of the "suppressed evidence." In United States v. Bagley, 473 U.S. ___, 105 S.Ct. 3375 87 L.Ed.2d 481, 494 (1985), the Supreme Court defined "materiality," as follows:

> [I]n Strickland v. Washington, US ___, 82 L Ed 2d 864, 104 S Ct 3562 (1984), the Court held that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at ___, 87 L Ed 2d ___." The Strickland Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Ibid.
>
> We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.
>
> (emphasis added)

As previously discussed, even if Brumley's credibility were impeached and the jury had believed that Appellant had only confessed to beating Paula Etheridge to death, the outcome of both the guilt and sentencing phases would not have changed. Appellee again maintains that overwhelming evidence of the element of premeditation and of the cruel, heinous, atrocious circumstance existed apart from Lem Brumley's testimony at the second trial.

Moreover Appellant has raised no fact that would possibly undermine confidence in the outcome, sub judice. Appellee reminds this Court that Lem Brumley's first trial testimony was substantially similar to his testimony at the second trial, and Brumley's first trial testimony was corroborated by Det. Bill Arnold (R. 3061-3062), supported, in part, by Appellant himself (3187-3188, 3232), and by Dr. Gilbert's testimony (R. 3121).

Obviously when viewed in light of the totality of circumstances existing at the instant trial, the course defense counsel would have taken, had he known about Brumley's illegal activities, could not have changed the outcome.

In any event, the evidence which Appellant asserts was "suppressed" was not material to either guilt or to punishment. Subsequent to Bagley, supra, this Court has stated:

> The test for materiality is whether the suppressed evidence "might have affected the outcome of the trial." United States v. Agurs, 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976).

Stone v. State, supra at 480. Appellee submits that since the alleged change in Brumley's testimony was relatively insignificant, trial counsel cannot be said to have been ineffective for failing to point it out, and therefore any information impeaching the motive for Brumley's alleged change, cannot meet the test of "materiality," for Brady violation purposes. Id.

In summation, Appellant's 3.850 motion stated no legally sufficient claims for relief. The instant record, as a whole, refutes Appellant's allegations as to ineffective assistance of trial counsel. It was not, therefore, practical to have attached portions of the record which conclusively show Appellant is not entitled to relief. Additionally, an evidentiary hearing on either of Appellant's claims would be an exercise in futility because, even if taken at face value, Appellant's allegations of changed testimony would not have affected the outcome of his trial.

CONCLUSION

Based upon the foregoing reasons and citations of authority, Appellee respectfully submits that the judgment and sentence of the lower court should be affirmed.

Respectfully submitted,

JIM SMITH
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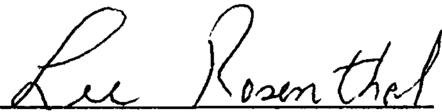

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by United States Mail, this 16th day of May, 1986, to: GERRY S. GIBSON, ESQUIRE, Steel Hector & Davis, 4000 Southeast Financial Center, Miami, Florida 33131.

Of Counsel